



To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights, supplies and water quality of our members.

May 2, 2008

Mr. Phil Isenberg, Chair
Delta Vision Blue Ribbon Task Force
c/o Resources Agency
State of California
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Re: NCWA's Comments for Delta Vision Strategic Plan – The Bay-Delta Conservation Plan Process Presents An Endangered Species Act Solution To The Delta's Endangered Species Problem

Dear Mr. Isenberg:

The Northern California Water Association ("NCWA") appreciates the opportunity provide comments for the Delta Vision Blue Ribbon Task Force to consider in developing a strategic plan. Because species listed under the federal and state Endangered Species Acts are driving the current Delta crisis, solutions to that crisis must be found under endangered species laws. NCWA encourages the Task Force to adopt a strategic plan that emphasizes expediting work on the Governor's on-going Bay-Delta Conservation Plan ("BDCP") effort. The Governor's effort properly focuses on in-Delta factors and, as currently designed, should not initiate a chain reaction of water-right and public trust disputes that would consume the water community, as would other possible proceedings. Given the seriousness of the Delta crisis, it is crucially important that the Task Force's strategic plan encourage the water community to work together to solve the Delta's problems and avoid initiating proceedings that could trigger what would be best described as a statewide water war.

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BACKGROUND

NCWA is a non-profit organization representing members that irrigate approximately 900,000 acres of farmland and provide water for wildlife and waterfowl habitat throughout the Sacramento Valley. NCWA's mission is to protect and enhance water rights, water supplies and the environment within the Sacramento Valley. NCWA's members primarily use water that is naturally available in their region and do not rely extensively on imports from other regions to satisfy their water demands, as do regions such as the San Francisco Bay Area and southern California. In particular, many of NCWA's members have developed locally-funded water-supply projects to serve local water demands. Some of these projects have supported other regions' water demands by transferring water to the Central Valley Project ("CVP") and the State Water Project ("SWP") during dry years.

In Executive Order S-17-06, Governor Schwarzenegger initiated the Delta Vision process and established the Task Force "to develop a durable vision for sustainable management of the Delta" with the goal of ". . . managing the Delta over the long term to restore and maintain identified functions and values that are determined to be important to the environmental quality of the Delta and the economic and social well being of the people of the state." The executive order requires the Task Force to prepare a strategic plan by October 31, 2008. On November 30, 2007, the Task Force issued its "vision" report, which contained twelve recommendations, including:

- "1. The Delta ecosystem and a reliable water supply for California are the primary, co-equal goals for sustainable management of the Delta. . . .
4. California's water supply is limited and must be managed with significantly higher efficiency to be adequate for its future population, growing economy and vital environment . . . Greater conservation, increased regional self-sufficiency in water supplies, more conjunctive uses, integrated water system management and demand management, and new technologies will all be essential.
5. The foundation for policymaking about California water resources must be the longstanding constitutional principles of 'reasonable use' and 'public trust'; these principles are particularly important and applicable to the Delta. . . .
7. A revitalized Delta ecosystem will require reduced diversions—or changes in patterns and timing of those diversions upstream, within the Delta, and exported from the Delta—at critical times. . . ."The Task Force has invited proposals for its Strategic Plan, concerning mainly: (1) governance and strategic finance; (2) reliable water for California; and (3) and public trust in California water policy

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making.”(Agenda item 2, Attachment 4, Task Force Meeting March 20-21, 2008). The Task Force has requested that submissions identify any significant barrier[s] to success.” (*Id.*)

**THE DELTA’S ENDANGERED SPECIES PROBLEMS REQUIRE
AN ENDANGERED SPECIES SOLUTION LIKE THE BAY-
DELTA CONSERVATION PLAN**

The current Delta crisis derives from the severe decline of in-Delta pelagic organisms like Delta smelt. Because those species are listed under the federal Endangered Species Act, biological opinions are required for CVP and SWP operations. Because federal District Court Judge Oliver Wanger has ruled that those opinions do not comply with the law and has ordered that species-protection measures be taken, the Delta’s species declines have triggered a water-supply crisis for some regions. **Because the Delta’s current crisis is so intertwined with species concerns, the only path by which the State can achieve a creditable and durable Delta solution is under state and federal endangered species laws.** NCWA commends Governor Schwarzenegger for recognizing this fact by pursuing a BDCP under the federal Endangered Species Act and the state Natural Community Conservation Planning Act. Because the Task Force cannot resolve issues under those acts, the best contribution it can make to resolve the current Delta crisis is to expedite a BDCP’s implementation.

As described in the March 17, 2008 CEQA/NEPA notice of preparation (“NOP”) issued by the Department of Water Resources (“DWR”), the Bureau of Reclamation, DWR, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, Delta water users and environmental groups are developing a BDCP and are analyzing “improved water conveyance infrastructure and other habitat conservation measures” (NOP, pp. 1-4.) BDCP’s objective is to support the issuance of incidental take permits under federal and state endangered species laws, as well as biological opinions and incidental take statements for the CVP’s operations. (*Id.*, p. 2). If the BDCP process is successful, then it will largely resolve the Delta’s pressing legal issues and hopefully support the recovery of the Delta’s natural resources.

Importantly to NCWA, the BDCP process also appropriately defines the relationship between the Delta’s current crisis and upstream water diversions. The NOP states that “it may be necessary for the BDCP to include conservation actions outside of the Statutory Delta,” but recognizes an important limit on such actions in stating “conservation actions outside of the Statutory Delta would be implemented **pursuant to cooperative agreements or similar mechanisms** with local agencies, interested non-governmental organizations, landowners, and others as appropriate.” (NOP, p. 7 (emphasis added).) The BDCP’s NOP therefore recognizes that NCWA’s members may

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contribute to enhancing Delta resources through voluntary agreements, as they have in prior dry years, when they have assisted other regions to meet their water demands through voluntary water transfers.

The Task Force's proceedings demonstrate the Governor is correct in targeting a solution that focuses on the Delta itself. Presentations to the Task Force by members of the Ecosystem working group have indicated that there may be significant relationships between in-Delta factors like invasive species and exotic plants like *Egeria*, increasing concentrations of pollutants like ammonia that affect Delta fish, recent shifts in export pumping from the spring to the fall, in-Delta agricultural discharges and Delta land uses and declines in the Delta's pelagic organisms.

Because the Delta has an endangered species problem, an endangered species solution is required. We therefore urge that the Task Force's strategic plan seek to: (1) expedite the Governor's on-going BDCP process; (2) identify the data gaps, legal concerns and jurisdictional conflicts that may hamper a BDCP's development; and (3) the propose solutions to those issues in order to restore the Delta's biological and legal resilience as quickly as possible. To the extent that implementation of a BDCP may require a new agency, the outline of such an agency will not be clear until a BDCP is completed.

**NCWA URGES THE TASK FORCE TO EMPHASIZE REGIONAL
SELF-SUFFICIENCY AS A FIRST STEP IN RESOLVING
CONFLICTS OVER THE DELTA'S RESOURCES**

NCWA urges the Task Force, in its strategic plan, to emphasize elements of its 2007 "vision" document that will encourage water users to be regionally self-sufficient as a means of reducing demands on, and therefore conflict over, the Delta's resources. NCWA was encouraged by the Task Force's Recommendation No. 4, under which the Task Force asserted that California's regions need to become more self-sufficient in meeting their water demands. As discussed above, NCWA's members have long been essentially self-sufficient in satisfying their water demands. NCWA's members have developed many locally-funded water systems based on some of the oldest pre-1914 and permitted water rights in the state, as well as extensive groundwater/surface water conjunctive use programs. NCWA understands the Task Force's Recommendation No. 4 to encourage other regions to follow NCWA's model by relying, to the maximum extent possible, on their local water resources to satisfy their local water demands.

NCWA also was encouraged by Recommendation No. 4's emphasis on "more conjunctive uses" and "integrated water system management." NCWA has spearheaded the development of the Sacramento Valley Integrated Regional Water Management Plan. That plan contemplates additional conjunctive use of the Sacramento Valley's

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groundwater and surface water. Moreover, as part of an agreement to settle Phase 8 of the State Water Resources Control Board's Bay-Delta proceedings, NCWA's members agreed to make more water available to the Delta through conjunctive use programs.

NCWA URGES THE TASK FORCE TO EXCLUDE FROM ITS STRATEGIC PLAN ANY RECOMMENDATION THAT ANY AGENCY INITIATE A MASSIVE PROCEEDING TO REALLOCATE WATER SUPPLIES

In contrast to the Task Force's Recommendation No. 4, implementation of what may be the intent of the Task Force's Recommendations Nos. 5 and 7 would be disastrous for water users, the environment and the citizens of the State of California. It would be a bitter irony indeed if the Task Force's strategic plan recommended reallocating water away from the State's most self-sufficient region.

Initially, it is unclear what Recommendation No. 5 means by saying that "[t]he foundation for policymaking about California water resources must be the longstanding constitutional principles of 'reasonable use' and 'public trust.'" The California courts have applied the public trust doctrine to reallocate water to environmental use in two settings: (1) to address the City of Los Angeles's diversions from the Mono Lake basin that directly and indisputably injured the Lake's resources; and (2) to address the CVP's and SWP's effects on the Delta. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82; *Cal. Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585; *Cal. Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187.) No court decision has authorized more general reallocations of water under the public trust, so such reallocations would not be supported by any "longstanding principle." Similarly, California law does not contain a "'reasonable use' principle" that authorizes wholesale reallocations of water. The California Constitution instead contains Article X, section two, which restricts unreasonable use, unreasonable methods of use and unreasonable methods of diversion. If Recommendation No. 5 means nothing more than that Article X, section two, governs California water uses, then NCWA cannot help but agree.

Since the Task Force adopted its "vision" document, however, public pronouncements by some affiliated with the Task Force have suggested that Recommendations Nos. 5 and 7 may be intended to promote "reform" of California's purportedly "archaic" water right priority system in order to maximize state control of Delta watershed water uses, notwithstanding the fact that communities throughout the Delta watershed have relied on that system in investing billions of dollars over many decades in developing their water supplies. **An effort to reallocate water supplies from the Delta watershed would be a significant barrier to success in achieving a long-term Delta solution.**

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California policy-makers have long recognized the importance of stability and certainty of water rights to an effective water management system. (See, e.g., *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354-356 (citing article by Robie & Steinberg).) Given that the Task Force is a gubernatorial commission, it is especially noteworthy that a previous gubernatorial commission recognized how important water-right certainty is in California. The Commission to Review California Water Rights Law appointed by Governor Edmund G. Brown Jr. made proposals “toward greater certainty in water rights” the first set of proposals discussed in its final 1978 report. (Governor’s Comm’n to Review California Water Rights Law, Final Report (December 1978) pp. 16-47.) Following on the Governor’s Commission’s work, the Legislature, in Water Code section 1011.5, specifically recognized that water-right certainty is necessary to implement conjunctive use:

The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water. The Legislature further declares that it is the policy of this state to encourage conjunctive use of surface water and groundwater supplies and to make surface water available for other beneficial uses. The Legislature recognizes that the substantial investments that may be necessary to implement and maintain a conjunctive use program require certainty in the continued right to the use of alternative water supplies.

Without water-right certainty, there would be no incentive for public or private sector investment in the water supply system. No one will invest in expensive conjunctive use or groundwater banking projects if the surface water supplies and rights essential for those projects’ successful operation can be reallocated or confiscated under the guise of “principles” of “public trust” and “reasonable use.” Initiating proceedings to reallocate water from diversions in areas upstream of the Delta to attempt to enhance the Delta’s resources would be a serious mistake, for several reasons.

First, it is unclear how such a proceeding would benefit Delta species whose decline triggered initiation of the Delta Vision process. Common sense dictates that factors that may act directly on Delta resources must be examined thoroughly before significant time and energy are spent addressing factors with, at most, indirect effects on those resources. Both the Delta Vision Ecosystem work group and the Central Valley Regional Water Quality Control Board have identified numerous in-Delta factors that have received relatively little attention – relative to the attention paid to the prospect of reducing upstream water diversions – but may have much more direct impacts on Delta natural resources like Delta smelt. NCWA urges the Task Force, the Delta Vision Committee and the Governor to focus on factors that act directly on the Delta’s resources

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and thus address the current emergency more rapidly and effectively than a proceeding targeting upstream water users ever could.

Second, such a proceeding would be extremely complicated, lengthy and hostile and would consume substantial time, energy and resources that would be better spent elsewhere. It would be very difficult to even identify and notify all of the “Delta watershed” parties who must have an opportunity to defend their water supplies under basic due process principles. The need to consider all of the relevant evidence would make the constitutionally-mandated hearing very long and contentious. Such a hearing would consume the California water community and inevitably overwhelm efforts by interested parties to move forward together to preserve and enhance the Delta. The 1978 Governor’s Commission identified this type of massive litigation as “[p]erhaps the most pernicious result of uncertainty in water rights” (1978 Governor’s Comm’n Report, pp. 22-25.) As the State Water Resources Control Board recognized in first staying, and then dismissing, its Phase 8 Bay-Delta hearing in light of the settlement reached by upstream water users – including NCWA’s members – and Delta exporters (see State Board Order WR 2001-05), much more progress can be made when water users are not forced to fight another for their water supplies.

Third, such a proceeding could present serious financial risks to the State. NCWA’s members have held their water rights and contracts for decades and have water-right priority over newer water uses. As Justice Ronald Robie stated in his 2006 opinion in *El Dorado Irrigation District v. State Water Resources Control Board*, “water right priority has long been the central principle in California water law.” If a “public trust” proceeding disregarded water-right priorities, or reallocated water away from water users whose activities have not demonstrably impacted the Delta, the State could face takings claims that would dwarf those made in the *Paterno* case following the 1986 flood. In its 1981 decision in *State of California v. Superior Court (Fogerty)*, the California Supreme Court stated that public trust resources may be used “for any purposes that are not incompatible with the public trust” and the State must compensate property owners if it forces property owners to abandon improvements that are not incompatible with the trust. In its footnote 22, the *National Audubon* decision recognized this requirement, too.

CONCLUSION

The Delta Vision Task Force’s Strategic Plan should urge the Governor and the Delta Vision Committee to proceed as rapidly as possible with the Bay-Delta Conservation Plan process. As currently organized, that process targets the appropriate solutions to the problems with the Delta species listed under the federal and state Endangered Species Acts. That process’s governing documents also reflect the fundamental point that upstream water users cannot be compelled to contribute to Delta solutions unless evidence demonstrates that their activities adversely impact the Delta’s

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resources. A plan like the current BDCP that targets the Delta's specific problems without proposing much more extensive reallocations of water supplies is both more likely to succeed and less likely to trigger massive conflict within California's water community.

A massive "public trust" or "reasonable use" hearing would consume time, energy and money better spent on developing solutions, would destabilize cooperative efforts like the Phase 8 settlement and the San Joaquin River Agreement and would trigger animosities that would impede cooperation among water users for decades. The Owens Valley's unfortunate experience teaches us the troubles that can be unleashed when one region's water supplies are sacrificed to other regions' demands. The Task Force must resist the siren song of seeking mass reallocation of water because falling under that song's spell would not serve either the Delta or the State well.

Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Ryan Broddrick", with a large, sweeping loop at the end.

L. Ryan Broddrick
Executive Director